No. 93-277

(2)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

HARRY S. THERIOT and RAUL TREVINO,

Petitioners,

vs.

GREAT WESTERN COCA-COLA BOTTLING COMPANY d/b/a COCA-COLA BOTTLING COMPANY OF HOUSTON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Under Rule 15(c) of the Federal Rules of Civil Procedure governing amended pleadings, does a suit filed against a defendant, after the statute of limitations has run, relate back to an earlier suit against a different defendant which was dismissed for failure to effect service, where no amendment was filed?

II. Does an alleged, unsubstantiated misrepresentation made by the EEOC regarding the limitations period for filing a lawsuit under the ADEA merit the application of the doctrine of equitable tolling to preserve the cause of action, where the law is clear as to the applicable statute of limitations and Petitioners were at all times represented by counsel?

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The Petitioners, Harry S. Theriot and Raul Trevino, filed a complaint against Great Western Coca-Cola Bottling Company, d/b/a Coca-Cola Bottling Company of Houston,[1] in the United

1. There are no parent companies or subsidiaries of Great Western Coca-Cola Bottling Company, because the entity no longer exists. Prior to its merger into Coca-Cola Enterprises Inc., Great Western Coca-Cola Bottling Company was a subsidiary of Coca-Cola Enterprises Inc. and Denver Coca-Cola Bottling Company.

States District Court for the Southern District of Texas, Houston Division, on February 18, 1992. The complaint is based solely on the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* The complaint recites that they were discharged by Coca-Cola on September 14, 1987. Consequently, any cause of action under the ADEA that the Petitioners may have had arose on or before September 14, 1987, some 4 years and 5 months before the complaint was filed.

Prior to the filing of the above referenced lawsuit, Petitioners filed a complaint (hereinafter referred to as the "first complaint") captioned *Harry S. Theriot and Raul Trevino v. Houston Coca-Cola Bottling Company,* Civil Action No. H-89-3171, in the United States District Court for the Southern District of Texas, Houston Division, on September 14, 1989, exactly two years after Petitioners' discharge from Respondent's employ. The complaint was based solely on the ADEA.

By order dated January 18, 1990, the first complaint was dismissed pursuant to Rule 4(j) of the Federal Rules of Civil Procedure, for failure to effect service of process within one hundred twenty (120) days of filing of the complaint. Petitioners did not seek to reinstate the complaint, nor did they assert an inability to locate Respondent's registered agent or any other reason for having failed to obtain service of process.

Petitioners filed a second complaint (hereinafter referred to as the "second complaint") on August 21, 1991, captioned *Harry S. Theriot and Raul Trevino v. Coca-Cola Enterprises Inc.,* Civil Action No. H-91-2463, in the United States District Court for the Southern District of Texas, Houston Division. The complaint was based solely on the ADEA. This second complaint was a completely new action, with a civil action number and caption different than that of the preceding complaint. It was not an amendment to the first complaint.

By order dated December 30, 1991, Petitioners' second complaint was also dismissed under Rule 4(j), on the basis that service of process had not been obtained within one hundred twenty (120) days of the filing of the complaint. Petitioners did not move to reinstate their second complaint, nor did they assert that they had been unable to find Respondent's registered agent.

Petitioners' third lawsuit, referenced above and filed February 18, 1992, is the basis of their present petition to the Court. This complaint (hereinafter referred to as the "third complaint") was filed four years and five months after their employment with Respondent was terminated (September 14, 1987). Claims filed under the ADEA must be filed within two years of accrual, unless the alleged violation is a willful one, in which case the complaint must be filed within three years. 29 U.S.C. § 626(e)(1); 29 U.S.C. § 255.

Respondent filed a motion to dismiss the third complaint and a supporting brief on March 17, 1992, on the basis that Petitioners' age discrimination claim was barred by the ADEA's two or three year statute of limitations. Petitioners filed a motion in opposition on April 8, 1992.

By final order of dismissal dated April 9, 1992, accompanied by a memorandum opinion, the District Court dismissed Petitioners' third complaint on the basis that the lawsuit was barred by the statute of limitations applicable to causes under the ADEA.

Petitioners filed a motion to reinstate on April 17, 1992, along with a copy of Petitioners' motion in opposition to Respondent's motion to dismiss, which Petitioners had previously filed on April 8, 1992. Respondent filed its response to the motion along with a supporting memorandum on May 7, 1992. The court denied Petitioners' motion to reinstate on May 27, 1992, again ruling that suit under the ADEA was barred by the applicable statute of limitations.

Petitioners filed a notice of appeal in April, 1992, and again on June 19, 1992. The United States Court of Appeals for the Fifth Circuit, by decision dated February 3, 1993, affirmed the dismissal of the complaint on the basis that it was barred by the statute of limitations. Petitioners' petition for rehearing was denied by order dated March 8, 1993.

Respondent filed a motion for sanctions with supporting memorandum of law and affidavit of Respondent's attorney on February 15, 1993, on the grounds that the Petitioners' appeal to the Fifth Circuit was frivolous, because its disposition was obvious given its complete lack of merit. Petitioners opposed the motion and filed a response. The motion was denied by order dated March 17, 1993.

The present petition for writ of certiorari was filed on June 7, 1993 (having been originally refused for failure to comply with the Rules of the Supreme Court and a corrected petition refiled on August 17, 1993).

SUMMARY OF ARGUMENT

Petitioners' employment with the Respondent, Great Western Coca-Cola Bottling Company, d/b/a Coca-Cola Bottling Company of Houston, was terminated on September 14, 1987. Petitioners filed a complaint in the United States District Court for the Southern District of Texas, Houston Division. The complaint was based upon the Age Discrimination in Employment Act ("ADEA"), and was filed on September 14, 1989, exactly two years from the date of their discharge. The complaint was properly dismissed under Rule 4(j) of the Federal Rules of Civil Procedure, for failure to obtain service of process within one hundred twenty (120) days of the filing of the complaint.

Petitioners did not move to reinstate the complaint. Instead,

they allowed some twenty (20) months to pass, and then filed a second complaint on August 29, 1991, again in the United States District Court for the Southern District of Texas, Houston Division, asserting a cause of action under the ADEA. This second complaint was not an amendment to the first complaint, and was given a different civil action number. Like the first complaint, the second complaint was properly dismissed pursuant to Rule 4(j) for failure to obtain service of process within one hundred twenty (120) days of the filing of the complaint. Again, Petitioners did not move to reinstate the action.

On February 18, 1992, Petitioners filed a third complaint alleging age discrimination under the ADEA. Approximately four years and five months had passed since their termination. The complaint did not in any way assert that it was an amendment to prior pleadings. Upon a motion of Respondent, the case was dismissed with prejudice on the basis that it had been filed outside of the two or three year statute of limitations for actions under the Age Discrimination in Employment Act.

Petitioners rely upon the relation back doctrine embodied in Rule 15(c) of the Federal Rules of Civil Procedure. Their reliance is misplaced. There is no evidence in the record before this Court which would suggest that the complaint filed on February 18, 1992, should relate back to the first complaint filed on September 14, 1989. Rule 15(c) speaks specifically to amendment of pleadings, and does not provide for relation back of subsequently-filed lawsuits. There are no facts in the record to support Petitioners' allegation that Respondent deliberately evaded service of process or disguised its true identity from the Petitioners. Nor have the Petitioners ever produced competent evidence of their unsuccessful attempts to discover Respondent's registered agent. Their assertion to this effect, coming only after the dismissal of their third complaint, is not worthy of consideration. Petitioners did not assert this argument until long after the time necessary to preserve it had passed.

Petitioners' failure to obtain service of process on Respondent after the filing of their complaints in September of 1989, and again in August of 1991, was purely a result of the Petitioners' own neglect. Therefore, the complaint filed February 18, 1992 should not relate back to the filing of the first or second complaint.

Petitioners' argument that the two or three-year statute of limitations applicable under the ADEA should have been tolled because of some representation made to them by an unspecified agent of the EEOC is unsupported by any evidence before this Court. Petitioners' first complaint filed under the ADEA recited on its face that suit was being filed within the two year limitations period. Approximately twenty (20) months later, Petitioners filed a second complaint, this time asserting that it was being filed within the five-year limitations period. Petitioners' assertion (made for the first time in their brief on appeal to the United States Court of Appeals for the Fifth Circuit) that they delayed in filing their lawsuit because of some representation made to them by an agent of the EEOC, is contradicted by the pleadings themselves. Additionally, at all times relevant hereto, the Petitioners had assistance of counsel. The claims of the Petitioners in their third complaint against the Respondent are clearly time-barred, and were properly dismissed with prejudice.

REASONS FOR DENYING THE WRIT

I.

THE FIFTH CIRCUIT PROPERLY REJECTED PETITIONERS' ARGUMENT FOR RELATION BACK OF THEIR COMPLAINT TO AN EARLIER, SEPARATE LAWSUIT.

Petitioners argue that Federal Rule of Civil Procedure 15(c) should be applied here to allow their suit to go forward. Rule 15(c)

begins with the statement that "[a]n amendment of a pleading relates back to the date of the original pleading when . . .," and then proceeds to list the situations in which relation back applies. The Petitioners never attempted to amend either their first or second complaint. Instead, they simply filed a completely separate lawsuit each time, naming a different defendant. In fact, the title of each subsequent complaint was entitled "*Original Complaint*," and made no reference to any earlier filed complaint.

Rule 15(c), by its very terms, applies only to amended pleadings. There is no authority which would extend the rule to subsequently-filed, separate lawsuits, or to situations in which no amendment has been filed. To the contrary, in a recent Sixth Circuit case, it was held that, where the plaintiffs neither sought to amend their complaint nor to alter or amend judgment, but filed a completely separate suit against a party not previously named only seven (7) days after the dismissal of the original complaint, Rule 15(c) would not be extended to correct the plaintiffs' mistake. *State Bank of Coloma v. National Flood Insurance Program*, 851 F.2d 817 (6th Cir. 1988). Additionally, in refusing to apply principles of equitable tolling based upon the actual knowledge of the proper defendants, the court held that:

> Where the Federal Rules of Civil Procedure provide the means to remedy a mistake, as they do here, equity does not require the court to provide an additional procedure.

Id. at 821; *see also, Worthams v. Atlanta Life Ins. Co.*, 533 F.2d 994 (6th Cir. 1976) (the word "amended" was stricken and a new civil action number assigned; therefore the complaint comprised a new action, not an amended complaint, and was barred by the statute of limitations).

In the present case, the passage of approximately twenty (20)

months between the filing of the second complaint and the filing of the first, and the fact that no motion to alter or amend judgment or to file an amended complaint was submitted, clearly moves this case beyond the mere "technical grounds of pleading" which rules such as Rule 15(c) were meant to address. Also noteworthy is that, from the time a responsive pleading has been served, a party must seek leave of court to amend a pleading, or attain consent of the adverse party. Fed. R. Civ. P. 15(a). At no time did Petitioners do so. Each time Petitioners' action was dismissed, they filed a completely new action. There is simply no "amended pleading" to relate back to the earlier complaints, and Petitioners have offered no authority to support their argument of relation back. Rather, Petitioners merely state that their complaints "should be considered as amendments and should relate back to their first Original Complaint." (Petition for Writ of Certiorari, p. 11).

The cases cited by Petitioners to support their relation back argument do not, in fact, support their position. The standard set forth in *Schiavone v. Fortune,* 477 U.S. 21 (1986), is indeed the appropriate standard to apply when relation back is at issue, even as the standard exists since the 1991 amendment of Rule 15(c). However, while *Schiavone* provides the standard for relation back under Rule 15(c), it specifically deals with an *amended complaint.* The case under consideration does not involve an amended complaint; rather, it involves three separate original complaints. For that reason, *Schiavone* is not applicable. Similarly, the Fifth Circuit's unpublished decision in *Dacus v. United States Postal Service,* No. 87-6067 (5th Cir. 1988) (LEXIS Genfed Library, USApp. file), and its decisions in *Bell v. Veterans Admin. Hosp.,* 826 F.2d 357, 359 (5th Cir. 1987), and *Gonzalez v. Secretary of Air Force,* 824 F.2d 392, 395-96 (5th Cir. 1987), all of which are cited in the petition for writ of certiorari, are inapposite. These cases deal with amended pleadings, while the present case does not.

In further support of their relation back arguments, Petitioners

assert that the Respondent somehow made it difficult for Petitioners to determine the appropriate registered agent for service of process through the Secretary of State. This argument is flawed on many levels, most notably that: (1) there is no evidence in the record to substantiate any such allegation; (2) Petitioners raised this argument for the first time only after their third complaint had been dismissed, and; (3) the argument mistakenly assumes that a corporate entity may only be served through its registered agent.

Rule 10 of the Federal Rules of Appellate Procedure provides in pertinent part:

> If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.

Petitioners were required to produce affidavits or other competent evidence regarding their efforts to effect service in order to avoid dismissal under Rule 4(j). *Cf., In re City of Philadelphia Litigation*, 123 F.R.D. 512 (D. Pa. 1988); *Shaw v. Rolex Watch U.S.A., Inc.*, 745 F. Supp. 982 (D. N.Y. 1990). Petitioners never offered any competent evidence, in the form of supporting affidavits or any other form, to either the District Court or the Fifth Circuit Court of Appeals. It follows that they cannot now assert these matters without evidentiary support in the record. The unsubstantiated assertions of Petitioners' counsel should not be given consideration.

Furthermore, Petitioners' argument was not timely raised. Petitioners waited until April, 1992 (Plaintiff's Motion in Opposition to Defendant's Motion to Dismiss) to complain that

they could not effect service because they could not locate Respondent's registered agent. Petitioners certainly had the opportunity to raise that argument on at least two occasions prior to the third dismissal, and yet failed to do so.

The burden to show why dismissal should not be granted in a given case rests solely with the plaintiff:

> If a service of the summons and complaint is not made upon a Defendant within one hundred and twenty days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that Defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

Fed. R. Civ. P. 4(j). If Petitioners' counsel ever genuinely believed that there was good cause for the failure of service, such as hardship in locating the appropriate party to accept service, then counsel should have raised that issue at the time that the first and second complaints were dismissed. As the District Court below noted in denying Petitioners' Motion to Reinstate the third complaint:

> [Plaintiffs'] allegation that they were unable to effect service on [defendant] because they could not identify a registered agent lacks credulity. Initially, the Court notes that the assertion was not raised in the two prior cases to explain the failure to effect service and to avoid dismissal or seek reinstatement. Additionally, [plaintiffs] have submitted no

> documentation indicating that they attempted unsuccessfully to locate a registered agent.

Likewise, arguments such as those alleging actual notice of or receipt of service by Respondent, and of service on an alleged "alter ego" corporation, both asserted by Petitioners in the Petition for writ of certiorari, were not timely raised below and therefore should not now be considered.

The Rules specifically provide a plaintiff a means and opportunity to object to dismissal and to show good cause for failure of service. *See* Fed. R. Civ. P. 4(j). Petitioners failed to utilize this remedy. As noted above, where the Rules provide a remedy, the court is not required to provide the non-diligent party with an additional procedure. *State Bank of Coloma*, 851 F.2d at 820, 821. Furthermore, Petitioners never filed a Rule 6(b) motion for an extension of time for service, a fact "which has been noted by other courts as at least some evidence of lack of diligence," *Quann v. Whitegate-Edgewater*, 112 F.R.D. 649, 661 (D. Md. 1986) (citations omitted), and thus as justifying dismissal.

Another flaw in Petitioners' argument is that it is premised on the mistaken notion that Respondent could only be served with process through a "registered agent." To the contrary, Rule 4(d) of the Federal Rules of Civil Procedure provides in pertinent part:

> The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:
>
> (3) Upon a domestic or foreign corporation . . . by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized

> by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

Respondent had a facility in Houston. It would have been a simple matter for the Petitioners to have accomplished service of process on "an officer, a managing or general agent." Assuming, *arguendo*, that the Petitioners did have trouble finding a "registered agent" for service of process, they should have attempted service on another designated representative. There is nothing in the record before this Court which would suggest that they attempted to do so.

Beyond these obvious fallacies in Petitioners' arguments, they have offered no reasonable explanation as to why they waited some twenty (20) months between the dismissal of their original lawsuit on January 18, 1990, and the filing of their second lawsuit on August 29, 1991. That delay of over one and a half years evidences the fact that the Petitioners were not having trouble obtaining service of process; rather, they were making no effort to do so. "One who fails to act diligently cannot evoke equitable principles to excuse that lack of diligence." *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984).

Based upon the foregoing, the Fifth Circuit properly concluded that Petitioners' complaint filed in February of 1992 should not relate back to the complaint filed in August of 1989.

II.

THE FIFTH CIRCUIT PROPERLY REJECTED PETITIONERS' ARGUMENT FOR EQUITABLE TOLLING OF THE STATUTE OF LIMITATIONS.

The Petitioners' lawsuit was initiated by a complaint which was filed on February 18, 1992. The complaint is based solely upon the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621, *et seq.* More specifically, the Petitioners have alleged that they were discharged on September 14, 1987, for no reason other than their age. Based upon the allegations in their complaint, a period of approximately four years and five months elapsed between the Petitioners' termination and the filing of their lawsuit on February 18, 1992.

29 U.S.C. § 626(e)(1) governs the statute of limitations in cases filed under the ADEA. It provides in pertinent part:

> Sections 255 and 259 of this title shall apply to actions under this chapter.

Consequently, the drafters of the ADEA relied upon the statute of limitations already set forth in 29 U.S.C. § 255. This statute provides in pertinent part:

> Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended [citations omitted] . . .
>
> (a) if the cause of action accrues on or after May 14, 1947 — may be commenced within

> two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued . . .

Thus, the applicable statute provides that a lawsuit brought under the ADEA must be commenced within two years after the employee is terminated, or within three years in the event that a willful violation has occurred. When the Petitioners filed their lawsuit four years and five months after they had been terminated, the statute of limitations had already expired.

In an effort to circumvent this problem, Petitioners have raised the argument that the statute of limitations should be tolled because some unidentified agent of the Equal Employment Opportunity Commission advised them that they were not subject to the two or three year statute of limitations; rather, they "were subject to the six-year statute of limitations that was allowed for federal employees . . . and the catch-all statute of limitations for non-tort civil claims against the United States Government . . ." (Petition for Writ of Certiorari, pp. 24-25). Petitioners' counsel never asserted this argument at the trial court level, either in the Plaintiffs' Motion in Opposition to Defendant's Motion to Dismiss the third complaint, or in their Motion to Reinstate the same complaint. The argument was raised for the first time in their memorandum in support of their appeal to the Fifth Circuit. In any event, Petitioners' delinquent argument should not be considered because there is absolutely no evidence in the record to support the naked assertion that an agent of the EEOC somehow misled them, beyond the affidavit of Petitioner Harry S. Theriot, filed only in response to Respondent's motion for sanctions on March 3, 1993, and well after the Fifth Circuit had heard and ruled on Petitioners'

arguments in reviewing the dismissal. Beyond that, this new-found assertion appears to be inconsistent with the record itself.

When the lawsuit was originally filed on September 14, 1989, on the last day of the two year statute of limitations, Petitioners were represented by their present attorney, Robert Wallace. Consequently, it would seem that any representations made by the EEOC would not have been to an uninformed layman, but rather to an attorney charged with the responsibility of knowing the law. In addition, in the first complaint the Petitioners alleged:

> The discriminatory acts of the Defendant occurred on the 14th day of September, 1987. On the 9th day of June, 1989, Plaintiffs received their notice of determination on review from the EEO Commission, and on this 14th day of September, 1989, *suit is filed in the Federal District Court within the two years [sic] limitation period.*

(Emphasis added). Consequently, Petitioners' counsel was aware of the two year statute of limitations as of September 14, 1989, when he originally filed a lawsuit. Because Petitioners were aware of their right to assert their ADEA claims in court, and were represented by an attorney throughout their dealings with the EEOC, they are "charged with knowledge of the law's requirement that any suit under the ADEA had to be brought within two [or three] years" of the date of the accrual of the action. *See Vesey v. Vitro Corp.*, 55 F.E.P. Cases 1100, 1103 (D.C. Md. 1990) (doctrine of equitable tolling would not save a claim from the ADEA's statute of limitations, where plaintiff claimed to have relied on erroneous advice from the EEOC); *Bell v. Veterans Admin. Hosp.*, 826 F.2d 257 (5th Cir. 1987) (rejecting a *pro se* plaintiff's argument that technical filing requirements should be waived because he was misled by the court; disallowing amendment to name proper defendant).

Petitioners' reliance upon *Johnson v. U.S. Postal Service*, 861 F.2d 1475 (10th Cir. 1988) is misplaced. In that case, a plaintiff proceeding *in forma pauperis* was denied the benefit of equitable tolling because he was not actively misled or lulled into inaction. *Johnson* does not support a liberal application of equitable tolling on these grounds. Rather, *Johnson* stands for the proposition that the doctrine should be strictly applied. Its reference to cases allowing equitable tolling stresses the absence of counsel, or involves a misrepresentation on an issue upon which the court or agency had a particular obligation to the plaintiff. In the present case, any alleged misrepresentation by the EEOC did not cause Petitioners' time to expire; rather, it was the fact that they waited until the very last day of the limitations period to file suit and then failed to effect service as required.

After the Petitioners' first complaint was dismissed for failure to prosecute, a second complaint was filed on August 29, 1991. Petitioners' counsel alleged in the second complaint that "suit is being filed in the Federal District Court within the five year limitation period provided under 29 U.S.C. Sec. 621." Petitioners' counsel again referenced a five year limitations period in the third complaint, which he filed on February 18, 1992. If at some point Petitioners' counsel was under the misunderstanding, based upon a representation from some unknown agent of the EEOC, that the claim was subject to a six year statute of limitations, then this impression never reflected itself in any of the pleadings which he filed. In those pleadings, Petitioners referenced a five year limitation period, and cited 29 U.S.C. § 621, as the basis for that assertion.

Petitioners' argument for equitable tolling of the statute of limitations is not credible. First, there is no authority to support the argument that the statute of limitations allowed for federal employees or for non-tort claims against the government should be applied to private employers. More important, however, is the fact

that, as of the date of filing the first complaint and at all times subsequent, Petitioners were represented by an attorney who knew or should have known that the ADEA provided a two or three year statute of limitations. Even assuming, *arguendo,* that Petitioners themselves may have "rightfully and reasonably" believed the alleged misrepresentations of the EEOC, their counsel is charged with the duty to know better, especially in the face of unambiguous law and precedent on the point. After all, the time for EEOC involvement had long passed.

The Fifth Circuit properly upheld the District Court's dismissal of Petitioners' claims on the basis that they were time-barred. The Petitioners' contentions regarding equitable tolling are without merit.

CONCLUSION

The Fifth Circuit properly upheld the District Court's dismissal with prejudice of the Petitioners' complaint filed on February 18, 1992, on the basis that their claims were barred by the applicable statute of limitations. There is neither authority nor support in the record before this Court to suggest that the complaint filed in February, 1992, should relate back to some earlier-filed complaint which was dismissed for failure to obtain service of process. Beyond that, there is no evidence before this Court, nor is there any reason that the statute of limitations applicable to ADEA claims should be equitably tolled.

Based upon the foregoing, Respondent respectfully requests this Court to deny the Petitioners' petition for writ of certiorari and dismiss this action.

Respectfully submitted,

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